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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES SPINELLA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement	2
Reasons for granting the writ	7
Conclusion	14
Appendix A	1a
Appendix B	17a
Appendix C	19a
Appendix D	21a
Appendix E	28a

CITATIONS

Cases:

D'Allesandro v. *United States*, No. 74-2682, decided May 1, 1975 (C.A. 2)	11
Fine v. *Commonwealth*, 312 Mass. 252, 44 N.E. 2d 659	13
Green v. *United States*, 355 U.S. 184	9
Lange, Ex parte, 18 Wall. 163	8
Nielsen, In re, 131 U.S. 176	8
North Carolina v. *Pearce*, 395 U.S. 711	9
United States v. *Jenkins*, 420 U.S. 358	10, 11
United States v. *Jerry*, 487 F. 2d 600	11
United States v. *Jorn*, 400 U.S. 470	11
United States v. *Miller*, 277 F. Supp. 200	12
United States v. *Wilson*, 420 U.S. 332	9, 10

Constitution, statutes and rules:	Page
United States Constitution, Fifth Amendment	8
18 U.S.C. 371	2
18 U.S.C. 2312	2
18 U.S.C. 2313	2
18 U.S.C. 4208(a)(2)	3
28 U.S.C. 2255	13
Federal Rules of Criminal Procedure, Rule 33	12, 13
Rules of the Supreme Court of the United States, Rule 19(1)(b)	8

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-16a) is reported at 506 F. 2d 426. The opinion and order of the district court vacating the order granting a new trial and reinstating the original

judgment of conviction (App. D, *infra*, pp. 21a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1975 (App. B, *infra*, pp. 17a-18a). A petition for rehearing, with a suggestion for rehearing *en banc*, was denied on June 11, 1975 (App. C, *infra*, pp. 19a-20a). On July 1, 1975, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including August 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars a district court from reinstating a judgment of conviction after the court has granted a new trial and the new trial has commenced.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, respondent and codefendants John Lettieri, Jerry Buchanan and Frank Merritt were convicted of receiving and transporting stolen vehicles in interstate commerce, in violation of 18 U.S.C. 2312 and 2313, and of conspiring to commit those offenses, in violation of 18 U.S.C. 371. Respondent was ultimately sentenced to imprisonment for one year and one day, with his

eligibility for parole to be determined by the Board of Parole as provided for under 18 U.S.C. 4208(a)(2) (J. App. 10-12, 18-19).[1]

After the court had sentenced all of the defendants, respondent and Lettieri filed motions for a new trial in which they alleged that codefendant Buchanan would testify to exculpate them if a new trial were granted (J. App. 12-18, 20-21).[2] The only matters discussed in the memorandum submitted by respondent in support of his motion (J. App. 15-18) related to his claim that he was entitled to a new trial so

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[1] "J. App." refers to the joint appendix in the court of appeals.

[2] Before the initial trial had begun, Lettieri had requested a severance on the ground that his codefendants would give exculpatory testimony if he were tried alone (J. App. 5-7). The court had denied this motion, without prejudice, because it was "unsupported by any affidavits or other evidence regarding what the testimony of the co-defendants [would] be, and its probative value to [Lettieri's] defense" (J. App. 7-8). Respondent had subsequently filed a document styled "Adoption by Defendant Spinella of Motions Filed on Behalf of Other Defendants." This document had not referred specifically to Lettieri's motion for a severance (J. App. 8-9).

On the first day of the initial trial, codefendant Buchanan filed an affidavit in which he stated that he would testify in Lettieri's behalf at a separate trial and that Lettieri "did not commit any of the wrongful acts attributed to him in the indictment" (J. App. 9-10). After the defense rested at the initial trial, respondent and Lettieri requested severances and offered testimony in support of their motions. With the jury absent, Buchanan testified that if respondent and Lettieri were tried separately from him, he would take the stand and refute the testimony of two government witnesses (J. App. 126-128). The court denied the motions for severance and submitted the case to the jury (J. App. 132-133).

that he could present Buchanan's testimony. The district court granted the motions for a new trial (J. App. 22-23).

At the retrial, respondent and Lettieri called only character witnesses. When the defense rested on the second day of trial without having called Buchanan, the court, out of the presence of the jury, told defense counsel that it had granted the new trial solely to permit respondent and Lettieri to present Buchanan's testimony (J. App. 139). Respondent's counsel (Mr. Booth) told the court that he had decided that it would not be in his client's "best interests" to call Buchanan as a witness since Buchanan had "expressed a great reluctance to testify because * * * [he had] a new trial coming up on a second case * * *" (J. App. 140).[3]

One of Lettieri's attorneys (Mr. Goshgarian)—who had represented Buchanan but not Lettieri at the initial trial and who continued to represent Buchanan—stated that on the first day of the new trial Buchanan had expressed a "great reluctance to testify" and that he "today * * * told me that it was against his best interests at this time to testify since his trial is coming up * * * and the publicity from testifying to this may affect that trial * * *" (J. App. 141). When the court asked whether Buchanan

[3] Buchanan was scheduled to be retried, after the jury at his original trial had been unable to reach a verdict, on federal charges arising from an earlier conspiracy to transport stolen vehicles in interstate commerce. These charges did not involve respondent or the other defendants in this case.

had actually refused to testify, Mr. Goshgarian answered "[y]es" (J. App. 146).

The court then called Buchanan, who had been waiting in the hall outside the courtroom throughout the trial, as its own witness to determine whether he was in fact unwilling to testify. Before Buchanan could be sworn, however, Mr. Goshgarian—now acting as Buchanan's attorney—advised Buchanan "not to give any testimony whatsoever" (J. App. 146-147).

The trial court thereupon terminated the second trial and discharged the jury. In a subsequent written order (App. D, *infra*, pp. 21a-27a), the court vacated its order granting respondent and Lettieri a new trial and reinstated the judgments of conviction entered at the first trial. The court noted that Buchanan had been outside the courtroom throughout the second trial, apparently waiting to testify, and that respondent and Lettieri had neither called him as a witness nor shown their good faith by requesting a hearing to establish that he would invoke his Fifth Amendment privilege if called to the stand (*id.* at 24a-25a).[4] The court further stated (*id.* at 25a-26a):

[4] A motion filed by Buchanan in the district court after the court of appeals reversed respondent's conviction, but before the government petitioned for rehearing (App. E, *infra*, pp. 28a-29a), suggests that counsel for Lettieri may have misled the trial court when he stated that Buchanan was not willing to testify. In the motion, Buchanan sought the dismissal of Mr. Goshgarian as his counsel and asserted that Goshgarian "misrepresented the Defendant [Buchanan] in this action by telling the court that Defendant refused to testify when in fact Defendant had sworn under oath that he would testify."

This type of conduct will not be tolerated in this Court. It not only is a breach of trust by those who are officers of the Court, but it borders on contempt and outright lying.

The defendants are entitled to one fair trial, not two. They have received that one and a whole lot more. They have attempted to take advantage of a system which works not only for their protection, but also for the protection of the people of the United States and the Court. The system of justice we have must be protected from abuse, fraud, and mockery of it, especially by those who are officers of the Court. What occurred in this case, initiated by the Defendants Lettieri and Spinella and their attorneys, amounts to a gross abuse, a very serious fraud and a mockery of a system that right now is protecting them. They have rendered everything this Court was attempting to do on their behalf a sham. They have grossly misused the process of this Court. They have caused the United States Government, the jurors who come to the Court, the witnesses who testified, their clients and friends to expend time and money not to mention the inconvenience, all so they could benefit.

The court of appeals, while affirming the convictions of Buchanan and Merritt (Lettieri did not appeal), vacated respondent's conviction and remanded with instructions to enter a judgment of acquittal (App. A, *infra*, pp. 15a-16a). The court held that the doctrine of double jeopardy barred the district court from reinstating the jury verdict rendered at the first trial, once the retrial had begun, and that, because no

manifest necessity existed for aborting the second trial, there could be no subsequent trial (*id.* at 14a).

REASONS FOR GRANTING THE WRIT

Despite the unqualified representation made by respondent in his motion for a new trial that at such trial codefendant Buchanan would testify to exculpate him, that testimony was not offered at the new trial granted on the basis of the representation. Yet, the court of appeals held that the judgments of conviction entered at the first trial could not be reinstated, and that any subsequent trial would violate the Double Jeopardy Clause because the court's decision to abort the second trial had not been justified by manifest necessity (App. A, *infra*, p. 14a). The effect of the court of appeals' decision is therefore to provide respondent with a uniquely undeserved windfall: respondent has received immunity from prosecution and punishment as a result of actions by him, or attributable to him, bordering upon fraud.

In explaining its holding, the court of appeals recognized that "[t]his result may be distasteful to some" and conceded that "it might be argued that our decision will serve to encourage motions for new trials in cases involving multiple defendants on grounds similar to those urged in the motion[s] involved in this case" (App. A, *infra*, p. 15a). Had the immunization of respondent from punishment—after his concededly valid initial conviction—proceeded from or served policies subsumed in the Double Jeopardy Clause, that result might have been counted simply as an unavoidable cost of preservation of

those policies. But the holding in this case is not required by the Double Jeopardy Clause; indeed, the court of appeals' decision can be rationalized only by ignoring the policies implicit in the protection against twice being placed in jeopardy.

The court of appeals' holding in this case is incorrect, and it will create continuing and unwarranted problems in the proper administration of the criminal laws. Indeed, we respectfully submit that the court of appeals in this case "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision" (Rule 19(1)(b), Rules of the Supreme Court of the United States).

1. The Fifth Amendment provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb * * *." This constitutional guarantee subsumes a number of related policies. Principles of fairness and finality require that once a person has been convicted and punished for a particular offense, he shall not be required to run the gauntlet again for the same offense or to suffer multiple punishments. *Ex parte Lange*, 18 Wall. 163; *In re Nielsen*, 131 U.S. 176. Similarly, when a person has been fairly acquitted of an offense, the Double Jeopardy Clause provides assurance that he shall not be made subject to repeated attempts to convict him, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U.S. 184, 187-188; see also *North Carolina* v. *Pearce*, 395 U.S. 711, 717.

The decision of the court of appeals in this case ignores these fundamental policies and in effect treats the Double Jeopardy Clause as a sword to avoid a single punishment following a valid conviction, rather than as a shield against multiple prosecutions, after an acquittal, and against multiple convictions and punishments. See *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 717. Far from subjecting respondent to further jeopardy, reinstatement by the trial court of the judgments of conviction entered at the initial trial simply restored respondent to the position he occupied before he successfully sought to be placed in jeopardy a second time. The entry of judgment on the original verdicts was within the power of the trial court and offended neither the Double Jeopardy Clause nor any other constitutional or statutory proscription.

This conclusion follows from this Court's recent decision in *United States* v. *Wilson*, 420 U.S. 332. *Wilson* involved an appeal by the government of a post-verdict order by the trial court dismissing an indictment. The court of appeals had dismissed the government's appeal, even though taken from an order entered after the jury had returned a verdict of guilty, because the trial court had relied upon facts brought out at trial and had characterized its order as an "acquittal." In reversing the court of appeals, this Court held that a government appeal under those circumstances did not implicate the proscription

against double jeopardy since reversal on appeal would "merely reinstate the jury's verdict" (*id.* at 345).

A significantly different, although nonetheless instructive, situation was presented in *United States* v. *Jenkins*, 420 U.S. 358. In that case, a trial court —sitting without a jury—had dismissed an indictment after having held that the statute under which the defendant had been charged could not properly be applied to him on the basis of the facts established at trial. Again, the government sought to appeal. This Court held that an appeal would offend the Double Jeopardy Clause since, even if the government prevailed on the legal issue, the case as a whole would still have had to be returned to the trial court for the resolution of factual issues going to the guilt or innocence of the defendant.

Thus, the pivotal issue in both *Jenkins* and *Wilson* was whether a successful appeal by the government would have required the defendant to submit to a further factual inquiry before the ultimate issue of his guilt or innocence could be resolved or whether judgment could simply be entered on a verdict already rendered.

We submit that the decision of the trial court in the present case to reinstate the jury's original verdict no more offended the Double Jeopardy Clause than did the decision in *Wilson* to permit the government to seek to reinstate the jury's original verdict. When the considerations—whether of fact or of law—that lead a trial court to set aside an otherwise valid verdict cease to exist, a criminal defendant is not placed

twice in jeopardy if the original verdict and judgment are reinstated. In both cases, "[t]o be sure, the defendant would prefer that * * * the judgment of conviction not be entered, but this interest of the defendant is not one that the Double Jeopardy Clause was designed to protect." *United States* v. *Jenkins*, *supra*, 420 U.S. at 365.

Since respondent requested and was granted a new trial on the basis of his representation that Buchanan would testify on his behalf, his right to the new trial was contingent upon that representation being fulfilled. When respondent chose not to call Buchanan as a witness, he in effect withdrew his motion for a new trial and forfeited his right to have the case submitted to the second jury. Cf. *D'Allesandro* v. *United States*, No. 74-2682 (C.A. 2, decided May 1, 1975) (slip op., pp. 3401-3402); *United States* v. *Jerry*, 487 F. 2d 600, 604-605, 607-608 (C.A. 3), and cases cited therein.[5]

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[5] Even if the trial court was wrong in assuming that it had the power to terminate respondent's second trial and to reinstate the judgments of conviction entered at the first trial, it can hardly be said that that assumption was an unreasonable one. We also believe that the trial court was justified in concluding that the only effective means of dealing with the defense overreaching (see discussion at pp. 3-6 and note 4, *supra*) that had motivated it to grant respondent's motion for a new trial was by terminating the second trial and reinstating the original judgments. In these circumstances, involving both substantial evidence of defense overreaching (see *United States* v. *Jorn*, 400 U.S. 470, 485) and a not unreasonable application of relevant legal principles, we submit that—at a minimum—the court of appeals should have remanded this case to the trial court with instructions permitting further prosecution of respondent.

2. The decision of the court of appeals threatens substantially to undermine the fundamentally equitable nature of Rule 33 of the Federal Rules of Criminal Procedure. Rule 33 provides in pertinent part that "[t]he court on motion of a defendant may grant a new trial to him if required in the interest of justice." In entertaining motions for new trials under Rule 33, trial courts must "be sensitive to any evidence which shows that the original trial resulted in a miscarriage of justice and weigh it carefully against the interest in finality and adherence to procedural requirements * * *." *United States* v. *Miller*, 277 F. Supp. 200, 206 (D.C. Conn.). When properly used, Rule 33 operates both to protect the criminal accused and to serve society's interest in fair trials ending in just judgments.

The decision of the court of appeals implements none of these interests. Rather, as the court of appeals recognized (App. A, *infra*, p. 15a), its holding encourages the filing of motions for new trials while at the same time providing a powerful incentive to trial courts to deny such motions on narrowly technical grounds. If the point at which a new trial is granted to a criminal defendant and commences becomes a point of no return in the criminal proceedings against him, trial courts can be expected to grant such motions only with extreme reluctance—even if they suspect that a new trial might turn out to be "in the interest of justice."

We submit that the dilemma presented to trial courts by the decision in this case has no place in the

implementation of Rule 33. Whenever it becomes evident to a trial court that the considerations that led it to set aside a judgment of conviction and to grant a new trial have ceased to exist, the court must have the discretion to rescind its grant of a new trial and to reinstate the prior judgment.[6] As the Supreme Judicial Court of Massachusetts stated in *Fine* v. *Commonwealth*, 312 Mass. 252, 258, 260, 44 N.E.2d 659, 663, 664:

> [T]here seems to be no good reason for holding that the power of a judge of the Superior Court with respect to a motion for new trial in a criminal case is ended when he grants or denies it. * * * If a judge * * * has no power to vacate his order granting a motion for new trial * * * it would * * * seem that justice might not prevail. * * *
>
> * * * * *
>
> * * * We are dealing with the power of a court that has general jurisdiction. It ought to be free to exercise that jurisdiction to the end that justice may be served. * * * It is true that when a new trial is granted, the verdict of the jury is set aside and the case stands as if there had been no trial, but if, upon proper reconsideration, the order granting the motion is vacated and a new trial is denied, the case stands

[6] The issues raised in this petition are equally pertinent in the case of new trials granted pursuant to 28 U.S.C. 2255. For the reasons already discussed, we submit that in appropriate circumstances district courts must be empowered to reinstate judgments of conviction and sentences set aside pursuant to 28 U.S.C. 2255, even though a new trial has been granted.

in so far as the trial is concerned, where it was left by the verdict of the jury.

* * * * *

* * * If the verdict was a true one, and the trial judge, by his final action, has said that it was, the petitioner has not been harmed. If there was any error at the trial, it is to be assumed that his bill of exceptions protects him.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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AUGUST 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 73-3904

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CHARLES SPINELLA, FRANK LESLIE MERRITT and JERRY BUCHANAN, DEFENDANTS-APPELLANTS

Jan. 13, 1975

Before WISDOM and BELL, Circuit Judges, and BREWSTER, District Judge.

WISDOM, Circuit Judge:

The defendants-appellants, Frank Merritt, Jerry Buchanan, and Charles Spinella, with one other, John Lettieri, were convicted of receiving and transporting stolen vehicles in interstate commerce, in violation of 18 U.S.C. §§ 2312 and 2313, and of conspiring to commit those offenses, in violation of 18 U.S.C. § 371. Lettieri did not join in this appeal. Buchanan and Merritt raise two contentions. First, they assert that the trial court violated their Sixth Amendment right to an impartial jury by refusing to grant a mistrial when it was discovered that two jurors had received threatening telephone calls during the course of the trial. Second, they assert that the trial court abused its discretion and denied them a fair trial in

that it did not grant Lettieri's motion for severance of defendants and for separate trials. Lettieri's objective was to introduce exculpatory testimony of Buchanan. Spinella also raises two issues on appeal. First, he contends that the double jeopardy clause prohibits a trial court once it has granted a motion for a new trial and the second trial has commenced before a jury, from aborting the second trial without the consent of the defendant, vacating the order granting a new trial, and reinstating the guilty verdict rendered in the earlier trial. Second, he contends that the trial court abused its discretion in denying his motion for severance filed between the first and second trials.

We affirm the judgment against Merritt and Buchanan; we vacate the judgment against Spinella.

I.

Mrs. Pushferran, one of the jurors, described the telephone call she received one evening during the course of the trial as follows:

> It was a little after nine o'clock or maybe nine o'clock. The phone rang, I picked it up and answered and said, "Hello." Someone on the other line, a man, a gentleman, said, "Miss Pushferran?" I said, "Yes." He said, "Mrs. Pushferran?" I said, "Yes." He said, "I am going to tell you this one time only and you better listen." He said, "It is about your husband," and I hung up because I got nervous and I just hung up.

Mr. Buckhalter, another juror, described a similar telephone call:

> So, I picked up the phone. I said, "Hello," and there was a man's voice on the phone that said, "Mr. Buckhalter?" I said, "Yes, sir." He said, "You know why I'm calling." I said, "No, I don't." I said, "Who is this?" He hung up. . . .

Mrs. Pushferran told the court that she had never received such a call before and that the episode upset her. Mr. Buckhalter, on the other hand, said that he had received "prank" telephone calls on a number of earlier occasions unrelated to the trial, and that the one involved here did not bother him any more than the others. At the request of defense counsel, the court excused Mrs. Pushferran from serving on the jury.

In these circumstances, the trial court had a duty to inquire into the character of the potentially prejudicial material to which the jury had been exposed, the extent of the exposure, and its effect upon the jury's ability to render an impartial verdict. United States v. Barson, 5 Cir. 1970, 434 F.2d 127, 131; Paz v. United States, 5 Cir. 1972, 462 F.2d 740, 747. There are a number of ways in which this duty can be discharged. For example, in the analogous context of potentially prejudicial publicity during the course of trial, the American Bar Association Standards Relating to the Administration of Criminal Justice, Fair Trial and Free Press, § 3.5(f) (1974), provides that the trial court should determine whether the material disseminated raises "serious ques-

tions" of potential prejudice to the defendant. In doing so the court "may on its own motion or shall on motion of either party question each juror, out of the presence of the others" regarding his exposure to the material.

Here, however, so the appellants argue, the court did not question each juror out of the presence of the others, as the ABA Standards suggest. Moreover, they suggest that the potential prejudice of the calls was so great in any event that no corrective measures taken by the trial court would have prevented its affecting the jury. We reject both contentions.

This Court recently considered measures that should be taken to ensure that certain inadmissible books which had reached the jury room had not affected the jury's verdict. In Paz v. United States, 5 Cir. 1972, 462 F.2d 740, 746, we held that the case should be remanded for an evidentiary hearing to determine "how the books reached the jury room; whether they were available to members of the jury, and if so, for how long; the extent if any, to which they were seen, read, discussed and considered by members of the jury; and such other matters as may bear on the issue of the reasonable possibility of whether they affected the verdict". The books in *Paz* were on narcotics and drug abuse, and the prosecution was for a drug-related offense. Nevertheless, we imposed no requirement that jurors be examined individually. Here, the telephone calls were vague

and not explicitly related to any matter at issue in the trial. We consider that they were not so inherently prejudicial so as to require the grant of a mistrial.

The trial judge took adequate corrective action. He questioned Mrs. Pushferran and Mr. Buckhalter, the only jurors who had received the calls, as to the telephone conversation and examined them as to the nature and extent of their discussion of the calls with the other jurors. Then, in deference to *defense* counsel's comment that to question each of the remaining jurors individually would serve to underscore the episode unduly, the court called in the whole jury and asked them whether they were willing to continue serving on the jury and were able to discharge their duties fairly and impartially in spite of the telephone calls. All of the other jurors, except Mrs. Pushferran, who had been excused, and the alternate said that they were able to ignore the incident and proceed to a fair and impartial resolution of the case. In light of the vague nature of the telephone calls and the misgivings defense counsel had voiced regarding individual questioning of the jurors, we hold that the procedure adopted by the trial court was adequate to protect the defendants from potential prejudice stemming from the calls.

II.

Before the first trial involved in this appeal, Lettieri filed a motion under Fed.R.Crim.P. 14 that he be tried separately from Merritt, Spinella, and Bu-

chanan, on the ground that if a separate trial were granted, these co-defendants would testify at his trial and that their testimony would exculpate him. Buchanan and Merritt did not join in this motion, yet they seek reversal of their convictions on the ground that its denial deprived them of a fair trial. Buchanan later filed a motion for entry of an order permitting him to "adopt all motions filed in behalf of" Lettieri. He also executed an affidavit in support of the motion for severance in which he stated that to his knowledge Lettieri "did not commit any of the wrongful acts attributed to him in the indictment", and that he, Buchanan, would "not testify in a joint trial but would testify in a separate trial." In cases where the allegedly aggrieved defendant has appealed, a penumbra protection has often been denied co-defendants. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); United States v. Foster, 7 Cir. 1973, 478 F.2d 1001; United States v. Bamberger, 9 Cir. 1973, 482 F.2d 166; Wright v. United States, 9 Cir. 1965, 353 F.2d 362. Those cases that have allowed any degree of penumbra effect have involved the extension of the protection sought by the directly aggrieved defendant. See Rosencranz v. United States, 1 Cir. 1964, 334 F.2d 738.

Whatever benefit severance might have brought to Lettieri, there is not "the clear showing of prejudice" to Buchanan and Merritt resulting from the denial of the motion for severance that is "required to establish that the District Court abused its discre-

tion in denying the motion". United States v. Eastwood, 5 Cir. 1974, 489 F.2d 818, 822. Indeed, the appellants have failed to demonstrate any respect in which the denial of Lettieri's motion prejudiced them. We dismiss therefore as insubstantial the contention that Buchanan and Merritt were denied a fair trial because Lettieri's motion for severance was denied.

III.

Before the first trial, as we stated, the defendant Lettieri filed a motion for severance on the ground that he would otherwise be denied exculpatory testimony of his co-defendants. The court denied this motion, but noted upon the docket sheet that the denial was without prejudice to Lettieri's right to renew the motion at time of trial. The court added that the motion as filed was "unsupported by any affidavits or other evidence regarding what the testimony of [co-defendants] will be and its probative value to [Lettieri's] defense." After the court denied Lettieri's motion, but still before the first trial, Spinella filed a document purporting to adopt all motions previously filed on behalf of the other defendants. It did not mention Lettieri's motion for severance, nor were there any affidavits or other evidence filed in support of the document. The court, in any event, took no action regarding the document. The trial commenced, and the jury found Spinella guilty as to the first count of the indictment. After the court had sentenced all the defendants, Spinella and Lettieri filed motions for a new trial, and, in support of the

motions, an affidavit of Buchanan that he would testify to exculpate them if a new trial were granted. The trial court granted the motion. The new trial for Lettieri and Spinella then commenced. On the second day of trial, the defense rested without having called Buchanan. The court, noting that the only reason it had granted Spinella and Lettieri the new trial was to enable Buchanan to testify on their behalf, discharged the jury, vacated its order granting a new trial, and reinstated the convictions the government had obtained at the first trial.

The court's chagrin at the turn of events immediately preceding entry of this order is understandable. Defense counsel could not force Buchanan to testify in behalf of Lettieri, but the representations counsel had made to the court, and the fact that Buchanan was in the hall outside the courtroom during the course of the second trial, apparently waiting to be called as a witness so that he could fulfill the promises set forth in his affidavit, led the court to believe that Buchanan would, in fact, testify. Indeed, it might even be argued that the trial court would have abused its discretion if, upon receiving the motion for a new trial supported by Buchanan's affidavit, it had denied the motion. Cf. Byrd v. Wainwright, 5 Cir. 1970, 428 F.2d 1017, 1022.

The movants failed to make a specific motion for severance, supported by affidavits on other evidence, before the commencement of the original trial. This failure argues strongly for a denial of a new trial. Spinella's motion, though styled a motion for a new

trial, was, in substance, a belated motion for severance; it makes no effort to characterize Buchanan's affidavit as "newly discovered evidence". The ABA Standards relating to the Administration of Criminal Justice, Joinder and Severance § 2.1(a) (1974) provides:

> A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if based upon a ground not previously known. Severance is waived if not made at the appropriate time.

In the case before us, however, the motion was granted, not denied. We must, therefore, turn our inquiry to the effect of granting the motion after the second jury had been sworn.

Many cases hold that a court of general jurisdiction has the power to vacate an order granting a new trial *before* the new trial commences in a *civil* case. See Annot., Power of Court to Vacate or Modify Order Granting New Trial in Civil Case, 61 A.L.R.2d 642. We have found no case, however, dealing specifically with the effect of commencing a second trial on an earlier criminal conviction. Jeopardy attaches when a criminal trial commences before the jury. United States v. Jorn, 1971, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543, Green v. United States, 1957, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199. The order granting the new trial necessarily has the effect of vacating the judgment of conviction rendered in the earlier trial. Cf. Miller v. United States, 5

Cir. 1955, 224 F.2d 561. It follows, then, that the trial court in the present case had no power to revive a judgment of conviction that became a nullity when the defendants were placed in jeopardy in the second trial. The order granting the new trial was unconditional; there was no waiver by the defendants of their right not to be put in jeopardy twice for the same offense. The fact that a new trial could only work to their advantage, since they had been convicted, is immaterial to the status of the first conviction once the trial began anew.

The only question that remains, once we have determined that the judgment of conviction obtained at the first trial could not be "reinstated", is whether Spinella may be tried again for the offenses charged in the first two trials. This question, in turn, depends upon whether the trial court was justified in aborting the second trial. The standard to be applied is that first laid down by Mr. Justice Story in 1824: when the trial court on its motion or on motion of the prosecution declares a mistrial, without the consent of the defendant, a retrial is permissible only if there exsits a "manifest necessity" for the declaration of the mistrial lest "the ends of public justice would otherwise be defeated". United States v. Perez, 1824, 9 Wheat. (22 U.S.) 579, 6 L.Ed. 165. *Perez* involved the discharge of a jury that could not reach a unanimous verdict in a capital case, without the consent of the defendant.

Later cases have amplified the test established in *Perez*. Justice Black, writing for the Court in Wade

v. Hunter, 1948, 336 U.S. 684, 688-89, 69 S.Ct. 834, 837, 93 L.Ed. 974, 978 stated:

> The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed.

The *Wade* Court held that manifest necessity was established when a court-martial, having continued a case to obtain the testimony of witnesses who were ill at the time of the first hearing, was overtaken by events (it was being held during the invasion of Germany in 1945), and therefore dissolved itself and transmitted the charges to another unit then stationed in the vicinity of the alleged offense, where a new court-martial was constituted.

In Gori v. United States, 1961, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901, the trial court in the first trial, fearing that the prosecution's line of questioning was calculated to elicit information that would inform the jury of prior crimes committed by the accused, precipitately declared a mistrial without consulting either the prosecution or the defense. The Court affirmed the defendant's conviction secured at a second trial on the same offense, noting that the record was "skimpy" and that the court of appeals

(which had also affirmed the conviction) was better situated to pass on the trial court's action, dependent as it was on factors such as the atmosphere in the district court and prosecutorial practices there. The fact that the trial court's action could only benefit the defendant also weighed heavily on the Court's mind.

It is this last element that distinguishes *Gori* from United States v. Jorn, 1971, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543. *Jorn* involved a prosecution for wilful participation in the preparation of fraudulent income tax returns. A taxpayer for whom the defendant had prepared a return was called as a witness, and, at the suggestion of defense counsel, the trial court admonished the witness of his right against self-incrimination. The witness was willing to testify, and informed the court that the Internal Revenue Service agent had advised him of his rights at their first meeting. For some reason, the court was still uneasy, and would not permit him to testify until he had consulted an attorney. There were several other witnesses in a similar situation whom the Government also wished to call. The court therefore declared a mistrial so that all these witnesses would have ample opportunity to consult attorneys and to be advised of their rights. The Supreme Court upheld a plea of former jeopardy when the Government sought to renew the prosecution. The mistrial was declared for the benefit of the witnesses, not the defendant as in *Gori*. Moreover, the Court noted, the problem of making certain that the taxpayer wit-

nesses were suitably advised of their rights might have been solved by the simple expedient of a continuance, but this course was precluded by the abrupt discharge of the jury.

Both *Gori* and *Jorn* may be contrasted with the Supreme Court's most recent treatment of the general problem. Illinois v. Somerville, 1973, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425. *Somerville* involved a prosecution for theft. The grand jury had returned an indictment, the case had been called for trial, and the jury had been sworn. Before any evidence had been presented, the prosecution realized that the indictment was fatally deficient in that it failed to allege that the defendant intended to deprive the owner of the property in question. Under Illinois law, the defect was fatal to the indictment and could be successfully urged on appeal as a jurisdictional defect rendering any final judgment of conviction ineffective. Accordingly, the prosecution moved for a mistrial, which was granted over the defendant's objection. The Supreme Court upheld the district court's denial of habeas relief relying in part on such precedents as Lovato v. New Mexico, 1916, 242 U.S. 199, 37 S.Ct. 107, 61 L.Ed. 244. In *Lovato* the Court held that manifest when, after it was sworn, the prosecution realized that the defendant had not pleaded to the indictment. The Court in *Somerville* held that manifest necessity was present and that the trial court need not have let the case proceed to conviction knowing that settled Illinois law would require reversal of the conviction. *Lovato* and *Somerville* are

both examples of cases in which retrial after mistrial has been permitted because some procedural defect or default on the part of the prosecution threatened to nullify the first proceeding. It is perhaps significant, however, that in both cases the mistrial was declared at the outset, before the taking of evidence.

The determination whether "manifest necessity" exists for the declaration of a mistrial is, of course, an inquiry particularly suited to case-by-case analysis, and not hospitable to generalities. "[V]irtually all of the cases turn on the particular facts and thus escape meaningful categorization". *Somerville*, 410 U.S. at 464, 93 S.Ct. at 1070. The Government naturally urges that the interest of public justice would best be served by our approval of the trial judge's action in aborting the second trial. We cannot do this. The trial judge failed to consider alternatives to declaring a mistrial. United States v. Kin Ping Cheung, 5 Cir. 1973, 485 F.2d 689. He could have denied the motion for a new trial, possibly on the ground that the reasons advanced in support of it were not timely presented. Having granted the new trial, he should have let the case go to the jury when it became apparent that the exculpatory testimony of Buchanan would not be forthcoming. There simply was no necessity for aborting the second trial, and, since the order granting the new trial could not be vacated once jeopardy had attached in the second trial, it follows that Spinella must be acquitted of the offenses charged.

This result may be distasteful to some, and we recognize that it might be argued that our decision will serve to encourage motions for new trials in cases involving multiple defendants on grounds similar to those urged in the motion involved in this case. In response, we note that the motion might be denied as untimely. Moreover, when applicable, the statutory sanctions available against false affidavits and false testimony should be invoked against those whose proffer of exculpatory testimony is the basis upon which a new trial has been granted. Further, the prosecutor might well consider the grant of statutory immunity from prosecution, when it is available, as a means of ensuring that the proffered testimony will be forthcoming. Finally, since the device of joint trials is tolerated largely as a means of promoting prosecutorial and judicial economy, the prosecutor might well give careful consideration to seeking separate trials from the beginning in any case in which he has reason to believe the difficulties encountered here may recur: the trial court might give similar consideration to motions for severance in such cases.

We do not reach Spinella's second contention, that the trial court abused its discretion in denying his motion for severance from Lettieri, filed the day before the second trial and presented to the court by the clerk the morning of the trial.

* * * *

For the reasons stated, the judgments of conviction entered against Buchanan and Merritt in the first trial are affirmed. The judgment of conviction en-

tered at that trial against Spinella, which the district court attempted to "reinstate" after aborting the second trial, is vacated, and the cause remanded to the district court with instructions to enter a judgment of acquittal on the offenses charged in favor of Spinella.

Affirmed in part, vacated in part, and remanded with instructions.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1974

No. 73-3904

D.C. Docket No. CR 73-598-CR PF

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

CHARLES SPINELLA, FRANK LESLIE MERRITT and JERRY BUCHANAN, DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the Southern District of Florida

Before WISDOM and BELL, Circuit Judges, and BREWSTER, District Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and vacated in part; and that this cause be, and the same is hereby remanded to the said District Court with instructions in accordance with the opinion of this Court.

January 13, 1975

Issued as Mandate: June 19, 1975
(AS TO CHARLES SPINELLA ONLY)

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-3904

[Filed Jun. 11, 1975 U.S. Court of Appeals,
Edward W. Wadsworth, Clerk]

UNITED STATES OF AMERICA, APPELLEE

versus

CHARLES SPINELLA, ET AL., APPELLANTS

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion 1-13, 1975, 5 Cir., 1975, —— F.2d ——)

(June 11, 1975)

Before WISDOM and BELL, Circuit Judges, and
BREWSTER, District Judge

PER CURIAM:

[X] The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

* * * * *

APPENDIX D

ORDER VACATING PRIOR ORDER GRANTING A NEW TRIAL

(Style and Number Omitted)

(Filed November 19, 1973)

THIS CAUSE came before the Court by way of the following facts and events:

1. On August 20, 1973, John Lettieri, Frank Merritt, Jerry Buchanan and Charles Spinella were indicted by a Federal Grand Jury here in the Southern District of Florida. The indictment was numbered 73-598-Cr-PF.

2. On September 17, 1973, Defendant John Lettieri filed a Motion for Severance of Defendants and Separate Trials with accompanying Memorandum of Law.

3. On September 25, 1973, the Defendant Lettieri's Motion for Severance of Defendants and Separate Trials was denied without prejudice to renew same at the time of trial because the motion was unsupported by any affidavit or other evidence regarding what the testimony of co-defendants would be and its probative value to the defendant's defense. The order denying this motion was signed by U.S. Magistrate Michael Osman.

4. On September 26, 1973, one day after the Court denied the Defendant Lettieri's above-mentioned mo-

tion, the Defendant Spinella filed a document titled, Adoption by Defendant Spinella of Motions Filed on Behalf of Other Defendants.

5. Prior to trial no other motions for severance or petitions for review were filed with the Court, by either Defendant Spinella or Defendant Lettieri.

6. On October 9, 1973, a Tuesday, the jury trial of all four defendants commenced.

7. On October 9, 1973, the Defendant Buchanan filed with the Clerk a document entitled Affidavit. This document exculpates in a general way the Defendant Lettieri. It is a notarized paper signed by Defendant Buchanan which states if granted a separate trial he would testify, apparently, on behalf of Defendant Lettieri.

8. The jury trial continued until October 11, 1973, a Thursday. On that date, before the case was given to the jury for consideration but after all sides had rested, the Defendants Lettieri and Spinella once again renewed their Motions for Severance and Separate Trials. At that time they offered testimony by the Defendant Buchanan in support of the motions. Under oath Defendant Buchanan stated if Charles Spinella were granted a severance and a separate trial he would refute certain government witnesses' testimony as it related to Defendant Spinella. He also stated he would take the stand and testify on behalf of John Lettieri and refute the testimony of certain government witnesses as it related to Mr. Lettieri, but only in the event it was not a joint trial. Both motions were denied at that time. The case was

given to the jury and they rendered verdicts of guilty as to each defendant. Adjudications of guilt as to each defendant were entered by the Court.

9. On October 12, 1973, Defendant Spinella was sentenced to one year imprisonment. A Judgment and Commitment was entered.

10. On October 18, 1973, Defendant Spinella filed a Motion for Judgment of Acquittal or in the Alternative for a New Trial, together with a supporting memorandum.

11. On October 25, 1973, the Court granted Defendant Spinella's previously filed Motion to Change Sentence. The sentence previously imposed was changed to read imprisonment for a period of a year and a day.

12. On October 29, 1973, Defendant Lettieri filed a Motion for a New Trial.

13. On November 1, 1973, the Court granted Defendant Spinella's and Defendant Lettieri's Motion for a New Trial. The Court set the trial date at November 12, 1973. The Court denied Defendant Spinella's Motion for a Judgment of Acquittal.

14. On November 9, 1973, a Friday, Defendant Spinella filed an additional Motion for Severance from Defendant Lettieri, together with a memorandum and a supporting affidavit. The Court did not see this motion until the morning of trial, November 12, 1973, a Monday. This new and latest motion was denied as untimely filed. It was ruled that the Defendant Spinella had waived whatever grounds he might have had for filing this motion.

15. The ordered retrial of Defendants Spinella and Lettieri commenced on Monday, November 12, 1973. On Tuesday, November 13, 1973, all sides rested. At this second trial Defendant Spinella called to the stand to testify one character witness. Defendant Lettieri called to the stand to testify four character witnesses. Neither Defendant Spinella nor Defendant Lettieri called Mr. Buchanan to the stand to testify on their behalf as their previously filed motions and affidavits and sworn testimony of Mr. Buchanan taken on October 11, 1973 at the first trial indicated they would do. This is so even though Mr. Buchanan was present outside the courtroom on both Monday, November 12, 1973, and Tuesday, November 13, 1973, apparently waiting to be called.

Although not specifically stated in any of its orders, this Court granted both defendants' Motions for Severance from Mr. Buchanan because of his sworn testimony before this Court on October 11, 1973 and in his signed affidavit filed with the Clerk of this Court on October 9, 1973, Mr. Buchanan stated he would testify for both Defendants Lettieri and Spinella in an exculpatory manner, refuting the testimony of certain government witnesses. However, he said he would only do this if a severance were granted. Therefore, in the interest of justice to all parties, and because a co-defendant cannot be compelled, at his own trial, to testify for his fellow defendants who are then on trial, this Court granted a severance to Defendants Lettieri and Spinella from Mr. Buchanan so they could avail themselves of his testimony. At

the retrial, while they both called other witnesses to testify, and while for both days of that retrial Mr. Buchanan was outside the courtroom apparently waiting to be called, neither Defendant Spinella nor Defendant Lettieri called him to the stand. Nor did they even, in good faith display to the Court, ask for a special hearing wherein they could call Buchanan and show he would avail himself of his Fifth Amendment privilege if called, if that were the case. In this instance the burden of coming forward with Mr. Buchanan was upon the defendants not because they were compelled by the Court or the Government to do so, but because it was they who said they would. It was they who initiated every step that was taken down the road to a retrial. It was they who sought an additional chance at exculpation for their clients. It was the Court who gave them the chance, but it was they who failed to seize the opportunity, an opportunity which the Government argues it would not have been an abuse of discretion to deny them. This type of conduct will not be tolerated in this Court. It not only is a breach of trust by those who are officers of the Court, but it borders on contempt and outright lying.

The defendants are entitled to one fair trial, not two. They have received that one and a whole lot more. They have attempted to take advantage of a system which works not only for their protection, but also for the protection of the people of the United States and the Court. The system of justice we have must be protected from abuse, fraud, and mockery of

it, especially by those who are officers of the Court. What occurred in this case, initiated by the Defendants Lettieri and Spinella and their attorneys, amounts to a gross abuse, a very serious fraud and a mockery of a system that right now is protecting them. They have rendered everything this Court was attempting to do on their behalf a sham. They have grossly misused the process of this Court. They have caused the United States Government, the jurors who came to the Court, the witnesses who testified, their clients and friends to expend time and money not to mention the inconvenience, all so they could benefit.

For all these reasons,

It is ORDERED AND ADJUDGED that the orders and proceedings held before this Court shall be as follows:

1. The motions of Defendants Spinella and Lettieri for a Severance and a New Trial made on October 11, 1973 as denied then are now revalidated and reinstated. The motions are once again *Denied.*

2. The adjudication of guilt as to Defendants Spinella and Lettieri entered on October 11, 1973 are revalidated and reinstated; that is, they are both now adjudicated guilty as they were on that date.

3. The sentence imposed on Defendant Spinella on October 12, 1973, as changed on October 25, 1973, is now revalidated and reinstated; that is, he is to serve one year and a day for the acts of which he was adjudicated guilty on October 11, 1973.

4. The Motion for a Judgment of Acquittal or in the Alternative for a New Trial filed by Defendant

Spinella on October 18, 1973 as partially denied and partially granted by this Court on November 1, 1973 is, as to the Motion for Judgment of Acquittal which was originally denied, revalidated and reinstated. That is the Motion for Judgment of Acquittal is denied. As to the alternative Motion for a New Trial which was originally granted by this Court on November 1, 1973, it is *Denied.* The original order granting this motion on November 1, 1973 is vacated and set aside.

5. The Motion for a New Trial filed by Defendant Lettieri on October 29, 1974 as originally granted by this Court on November 1, 1973 is *Denied.* The original order granting this Motion on November 1, 1973 is vacated and set aside.

6. All other Orders previously entered in this case will remain in full force and effect.

DONE AND ORDERED at Miami, in the Southern District of Florida, this 19th day of November, 1973.

/s/ Peter T. Fay
United States District Judge

* * * *

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 73-598-CR-PF

UNITED STATES OF AMERICA

vs

JERRY BUCHANAN

MOTION TO DISMISS COUNSEL; TO APPOINT NEW COUNSEL: AND EXTEND DATE OF MANDATE

COMES NEW the Defendant, by his own hand, and moves this Honorable Court as follows:

1. That the Court release Aram P. Goshgarian as Counsel for the Defendant since Counsel has failed to properly represent Defendant in this action: Counsel misrepresented the Defendant in this action by telling the Court that Defendant refused to testify when in fact Defendant had sworn under oath that he would testify; Counsel failed to represent Defendand in oral arguments in Appeals Court in New Orleans; Counsel also failed to appear at mitigation hearing before Judge Atkins; Counsel did not advise Defendant of substance of appeal nor given any copies of documents filed; Counsel was observed sleeping during the original trial by witnesses who will testify to same.

2. Defendant also prays the Court will extend the date of any mandate to allow him time to consult with Counsel; Defendant at the present is working with the U.S. Attorney's office as a witness in a case to be tried before this court on February 17, 1975, and such extension will help with the investigation now being conducted by the DEA.

THEREFORE, the Defendant prays the Court will be lenient in granting the motions.

Signed in Miami, Florida, this 21st day of January, 1975.

/s/ Jerry Buchanan
JERRY BUCHANAN (Defendant)

CC to: U.S. Attorney William Northcutt

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 590210 15